Supreme Court, U.S.
FILED
99 171 JUL 15 1999
OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

THOMAS C. ROBERTSON, JR.

Petitioner,

v.

ALABAMA DEPARTMENT OF REVENUE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CIVIL APPEALS

PETITION FOR CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE STATE OF ALABAMA CAN REQUIRE A NEW ALABAMA RESIDENT TO ADJUST HIS BASES IN PROPERTIES LOCATED IN FOREIGN STATES FOR DEPRECIATION FOR PERIODS IN WHICH HE DID NOT RESIDE IN ALABAMA AND DID NOT RECEIVE THE BENEFIT OF A DEPRECIATION DEDUCTION.

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 7

I. THE COURT OF CIVIL APPEALS IMPROPERLY HELD THAT SECTION 40-18-6(b)(2) REQUIRES ALABAMA TAXPAYERS TO ADJUST THEIR BASES IN PROPERTIES OWNED IN FOREIGN STATES FOR DEPRECIATION DURING PERIODS IN WHICH THEY DID NOT RESIDE IN ALABAMA BECAUSE THIS INTERPRETATION TAKES PROPERTY WITHOUT DUE PROCESS AND DISCRIMINATES AGAINST NONRESIDENT CITIZENS. 7

A. The Department's interpretation of Alabama Code § 40-18-6(b)(2) is overly broad. 8

B. The Department's taxation of Mr. Robertson for the period prior to 1991 is unconstitutional because it constitutes a taking of his property

without due process. 11

C. The Department's taxation of Mr. Robertson for the period prior to 1991 is unconstitutional because it discriminates against Mr. Robertson solely for the reason that he was a nonresident. 13

CONCLUSION 21

APPENDIX. A1

TABLE OF AUTHORITIES

FEDERAL CASES

Allegheny Pittsburgh Coal Co. v. County Comm'n., 109 S. Ct. 633 (1989) 15

Lunding v. New York Tax Appeals Tribunal, 118 S. Ct. 766 (1998) 14, 15

Miller Bros. v. Maryland, 74 S. Ct. 535 (1954) 7, 10, 12

Southern Ry. Co. v. Kentucky, 475 S. Ct. 542 (1927) 9

FEDERAL STATUTES

U.S. CONST. art. IV, § 2 13

U.S. CONST. amend. XIV, § 1..... 12

STATE STATUTES

ALA. CODE § 40-18-6(a) (1993) 9

ALA. CODE § 40-18-6(b)(2) (1993) 9-10

ALA. CODE § 40-18-7(a) (1993) 9

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OPINIONS BELOW

The opinion of the Administrative Law Division for the State of Alabama has not been officially reported and is attached herein. The decision of the Circuit Court of Montgomery County, Alabama for the Fifteenth Circuit is also unreported and is attached herein. The decision of the Alabama Court of Civil Appeals is reported at 1998 Ala. Civ. App. LEXIS 392. The decision of the Alabama Supreme Court is

unreported.

JURISDICTIONAL STATEMENT

This is an appeal from a final order entered by the Alabama Supreme Court on April 16, 1999. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are relevant and are set forth in Appendix A: U.S. CONST. amend. XIV, § 1; U.S. CONST. art. IV, § 2(1); and ALA. CODE § 40-18-6(b)(2) (1993).

STATEMENT OF THE CASE

1. In the early 1980s, Thomas C. Robertson, Jr. (hereinafter referred to as "Robertson") purchased three pieces of rental property located in Oklahoma. (C. 85-88).

2. Robertson was a resident of Oklahoma at the time the rental properties were purchased. (C. 86).

3. Robertson claimed depreciation on the rental properties on his federal income tax returns each year until the time the properties were sold. (C. 88-89).

4. Robertson claimed depreciation on the rental properties on his Oklahoma income tax returns. (C. 86).

5. After moving from Oklahoma to Hawaii, Robertson then moved to Missouri, and later to Texas. (C. 87).

6. Robertson does not remember if he claimed depreciation on the rental properties during the periods he resided in Hawaii and Missouri. (C. 87-88).

7. Texas did not impose income tax on individuals

at the time Robertson lived in that state. (C. 87).

8. Robertson moved to Alabama in 1991. (C. 89).

9. Robertson sold the rental properties in 1992 and 1993. (C. 88).

10. Robertson filed Alabama income tax returns in 1992 and 1993 and also filed an amended Alabama income tax return in 1992. (C. 93-94).

11. On his 1992 and 1993 Alabama income tax returns, Robertson adjusted his bases in the rental properties for the amount of depreciation claimed during the period of his residency in Alabama. (C. 93-94).

12. Robertson's 1992 and 1993 income tax returns were audited by Revenue Examiner John R. Davis. (C. 92-93).

13. Mr. Davis recomputed Robertson's bases in the rental properties to reflect the deduction for depreciation claimed by Robertson prior to the date he moved to Alabama. (C. 93-94).

14. Based on the recomputationsmade by Mr. Davis, the Alabama Department of Revenue (hereinafter referred to as "Department") entered final assessments of individual income tax against Robertson for the tax years 1992 and 1993 in the amounts of $972.94 and $2,013.19, respectively. (C. 128-129).

15. Robertson appealed the Department's final assessment to the Administrative Law Division and the presiding Administrative Law Judge ruled in favor of Robertson.

16. The Department appealed to the Montgomery County Circuit Court and that Court affirmed the Administrative Law Judge's ruling in favor of Robertson. Robertson raised the issue of whether the Department's interpretation of the statute violated the Due Process Clause, but this issue was not addressed by the court in its opinion.

17. The Department then appealed to the Alabama Court of Civil Appeals and that Court reversed the Montgomery

County Circuit Court and Administrative Law Division on May 22, 1998 ruling in favor of the Department. Robertson raised the issue of whether the Department's interpretation of the statute violated the Due Process Clause, but this issue was not addressed by the court in its opinion.

18. Robertson submitted an Application for Rehearing to the Alabama Court of Civil Appeals on June 5, 1998 and the Alabama Court of Civil Appeals overruled Robertson's Application on July 10, 1998.

19. Robertson submitted a Petition for Writ of Certiorari to the Alabama Supreme Court on July 22, 1998 and the Alabama Supreme Court denied the Petition for Writ of Certiorari on April 16, 1999. Robertson raised the issue of whether the Department's interpretation of the statute violated the Equal Protection Clause and the Privileges and Immunities Clause, but this issue was not addressed by the court.

ARGUMENT

I. THE COURT OF CIVIL APPEALS IMPROPERLY HELD THAT SECTION 40-18-6(b)(2) REQUIRES ALABAMA TAXPAYERS TO ADJUST THEIR BASES IN PROPERTIES OWNED IN FOREIGN STATES FOR DEPRECIATION DURING PERIODS IN WHICH THEY DID NOT RESIDE IN ALABAMA BECAUSE THIS INTERPRETATION TAKES PROPERTY WITHOUT DUE PROCESS AND DISCRIMINATES AGAINST NONRESIDENT CITIZENS.

The power of a state to tax is limited to persons and property within its jurisdiction. Where there is no jurisdiction either as to person or property, the imposition of a tax is void. Miller Bros. v. Maryland, 74 S. Ct. 535, 537 (1954). Alabama Code § 40-18-6(b)(2) permits depreciation to be taken only to the extent allowable under Alabama law. Based on this statute, the Alabama Department of Revenue (hereinafter referred to as the Department) requires a resident to depreciate property over the entire useful life of the property, regardless of whether

Alabama had jurisdiction over the individual during the useful life of the property. This broad interpretation violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution because it results in the taxation of an individual for a period of time when that person was not within the state's jurisdiction. This interpretation also violates both the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article Four of the Constitution because the result discriminates against nonresidents. If an individual was unable to deduct depreciation in certain states as a resident of those states, then he is paying more in taxes than a resident of Alabama who is similarly situated. To require nonresidents to pay more taxes without a reasonable justification or rational basis is unconstitutional.

A. The Department's interpretation of Alabama Code § 40-18-6(b)(2) is overly broad.

This petition revolves around the application of

depreciation deductions for real property under Alabama law. When property is purchased, the basis in the property for tax purposes is equal to the purchase price. ALA. CODE § 40-18-6(a). As the taxpayer holds the property, the taxpayer generally may deduct depreciation based on the usefulness of the property being exhausted. However, when depreciation is deducted, the basis of the property decreases. The future tax liability upon the sale of the property increases with each depreciation deduction taken. ALA. CODE § 40-18-6(b). If the taxpayer sells the property, the taxpayer's tax liability is determined, in part, by the difference between the price received for the property and the property's basis. ALA. CODE § 40-18-7(a). The overall result of depreciation is that a taxpayer enjoys a present tax deduction in exchange for an increase in future tax liability.

A state cannot tax a nonresident's property that is located outside of that state's jurisdiction. Southern Ry. Co. v. Kentucky, 47 S. Ct. 542, 544 (1927). In order for a state to

impose a tax on an individual, that state must have jurisdiction over the person or his or her property. In terms of real property, the taxpayer must either have property in the state or be a resident of the state in order for that state to have jurisdiction. However, when a state does not have jurisdiction either as to person or property, imposition of a tax is ultra vires and void. Miller Bros., 74 S. Ct. at 537.

The Alabama Code limits the application of a depreciation deduction to property located within the state's jurisdiction or to residents of Alabama. Section 40-18-6(b)(2) of the Alabama Code (hereinafter referred to as "§ 40-18-6(b)(2)") provides that for purposes of determining the gain or loss from the sale or disposition of property, an adjustment shall be made "for exhaustion, wear and tear, obsolescence, amortization and depletion, to the extent allowed, but not less than the amount allowable under this chapter of prior income tax laws." ALA. CODE § 40-18-6(b)(2) (1993). Basically, this

statute explains that a taxpayer's basis in property shall be reduced by the amount of depreciation allowed under Alabama law. The Department's broad interpretation of this section requires a taxpayer's basis in property to be reduced by all depreciation deductions allowable under Alabama law, regardless of whether the taxpayer was an Alabama resident or subject to Alabama law at that time. This interpretation is overly broad because it allows Alabama to tax an individual on property for a period of time when that person was not subject to the state's jurisdiction.

B. The Department's taxation of Mr. Robertson for the period prior to 1991 is unconstitutional because it constitutes a taking of his property without due process.

The Due Process Clause of the Fourteenth Amendment requires a state to have jurisdiction over an individual or his or her property in order to assess a tax on that person. In order to

acquire jurisdiction, the state must have at least some minimum connection with the person or property. Miller Bros, 74 S. Ct. at 539. When there is no jurisdiction as to either the person or the property, then the imposition of a tax on that individual is "simple confiscation and a denial of due process of law." Id. at 537. Therefore, any imposition of a tax without jurisdiction is void. Id.

The Department's interpretation of § 40-18-6(b)(2) violates the Due Process Clause of the Fourteenth Amendment because it results in the confiscation of property from a nonresident taxpayer without due process of law. U.S. CONST. amend. XIV. Section 40-18-6(b)(2) permits depreciation to be taken on property only "to the extent allowed" under the Alabama Code. This language implies that a depreciation deduction may be taken by residents or individuals with property in Alabama. Mr. Robertson was neither a resident of Alabama nor had property in Alabama prior to moving there in

1991; therefore, Alabama did not have jurisdiction over him prior to 1991. Yet, the Department wants to tax Mr. Robertson for the period prior to 1991 by forcing him to reduce his basis in the property he owned in Oklahoma, which results in more taxable income from the subsequent sale of the property. Therefore, any tax on Mr. Robertson concerning the period prior to him becoming an Alabama resident deprives him of his property without due process of law.

C. The Department's taxation of Mr. Robertson for the period prior to 1991 is unconstitutional because it discriminates against Mr. Robertson solely for the reason that he was a nonresident.

The Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article Four require reasonable uniformity of taxation. U.S. CONST. amend. XIV; U.S. CONST. art. IV. A state has "considerable freedom to establish and adjust its tax policy

respecting nonresidents." Lunding v. New York Tax Appeals Tribunal, 118 S. Ct. 766, 779 (1998). However, no higher rate of tax may be imposed on one person or species of property than on others similarly situated or of like character without reasonable justification for the different treatment. Id. at 774. If the tax unreasonably treats similarly situated individuals differently, then the tax policy may be discriminatory. Therefore, a taxpayer may challenge an allegedly discriminatory state tax through the Equal Protection Clause and the Privileges and Immunities Clause.

This Court has held that tax provisions which discriminate against nonresident taxpayers must be reasonable in effect and be based on a substantial justification other than the fact that the taxpayer is a nonresident. Id. at 782. The Privileges and Immunities Clause of Article Four requires that citizens of each state be placed on the "same footing with citizens of other States." Id. at 773. One right secured by this

requirement is the right of an individual to move to another state and not be subjected to more onerous taxation than the citizens of that state. Id. As a result, nonresidents must be allowed tax exemptions in parity with residents similarly situated. Id. at 780. In order to protect nonresidents from discrimination through taxation, this Court has required that any provision imposing "disparate taxation upon nonresidents must be appropriately justified." Id. at 779.

An analysis of a state tax law under the Equal Protection Clause is similar to the analysis under the Privileges and Immunities Clause because the purpose of both rights in terms of taxation is to prevent unjustified discrimination of nonresident citizens. The Equal Protection Clause protects an individual from a state subjecting him or her to taxes that are not imposed on others of the same class. Allegheny Pittsburgh Coal Co. v. County Comm'n., 109 S. Ct. 633, 639 (1989). Under the Fourteenth Amendment, a state that classifies certain

individuals, such as nonresidents, must base the classification upon some reasonable consideration of policy. Id. at 638. If there is no reasonable basis for the classification, then the state is denying the affected individuals equal protection of the law.

The Department has no rational justification or reasonable basis for requiring Mr. Robertson to pay taxes on property for the period when he was not an Alabama resident. The Administrative Law Judge explained in his opinion that the Alabama tax provisions reduce the taxpayer's basis for depreciation "to put a taxpayer in the same position tax-wise as if the depreciation had not been claimed in the first place." Thompson Final Order at 3. The Department is assessing taxes against Mr. Robertson for a period when he was ineligible to deduct depreciation under the applicable state law of Mr. Robertson's residence. This will result in Mr. Robertson paying more tax than an Alabama resident similarly situated because Mr. Robertson was not given an opportunity to deduct the

depreciation on his Alabama tax return. To tax Mr. Robertson for the period prior to 1991 does not put him in the "same position tax-wise" as residents who had an opportunity to take the depreciation deduction. Thompson Final Order at 3. Therefore, Mr. Robertson is subjected to discriminatory tax treatment based solely on his status as a nonresident prior to 1991.

The discriminatory outcome is evident when comparing a taxpayer who owns property in Alabama and resides in Alabama at all times. Assume that Mr. Robertson and the Alabama taxpayer each purchase property for $10,000. This Alabama taxpayer is allowed to annually deduct $1,000.00 in depreciation reaping a tax benefit. In year four this Alabama taxpayer sells his property for $9,000. The Alabama taxpayer will have taxable income of $3,000 because his basis will have decreased to $6,000 based upon his depreciation deductions. Therefore, this Alabama taxpayer's taxable income is increased

because the depreciation has been recaptured. Mr. Robertson, on the other hand, will not receive the benefit of the $3,000 deduction; however, based upon the Department's interpretation, Mr. Robertson must still decrease his basis. Therefore, Mr. Robertson will have the same taxable income as that of the Alabama taxpayer even though he never received any benefit from the depreciation. The Alabama taxpayer has an economic advantage over Mr. Robertson based upon the Department's interpretation because the Alabama taxpayer received the benefit of deductions whereas Mr. Robertson is penalized by recapturing a benefit he never received. The following chart illustrates this concept.

	Alabama Taxpayer	Robertson
Basis in Property	$10,000	$10,000
Year 1 Deprecation Deduction *Tax Benefit Basis	 $1,000 $ 50 $9,000	 $1,000 $ 0 $9,000
Year 2 Depreciation Deduction Tax Benefit Basis	 $1,000 $ 50 $8,000	 $1,000 $ 0 $8,000
Year 3 Depreciation Deduction Tax Benefit Basis	 $1,000 $ 50 $7,000	 $1,000 $ 0 $7,000
Year 4 Depreciation Deduction Tax Benefit Basis	 $1,000 $ 50 $6,000	 $1,000 $ 0 $6,000
Year 4--Sale Property for $9,000 Taxable Income Derived From Sale	$3,000	$3,000
Tax Benefit Derived From Deductions	$ 200	$ 0

* The Tax Benefit is the value of the deduction multiplied by a taxpayer's marginal rate of income tax. In Alabama, the highest marginal rate is 5%.

Based upon the above chart, each taxpayer's taxes are calculated by the following illustration:

		Alabama Taxpayer	Robertson and Taxpayers Similarly Situated
Taxable Income		$3,000	$3,000
Rate of Taxation	X	5%	5%
Tax Imposed	=	$1500	$1500
Tax Imposed		$1500	$1500
Tax Benefit Received	-	$ 200	$ 0
Amount of Taxation Ultimately Imposed		$1300	$1500

Thus, on the same exact sale of property, the Alabama taxpayer increases his wealth by $200 in comparison to Robertson and other taxpayers similarly situated based upon the Department's interpretation of § 40-18-6(b)(2). This interpretation of § 40-18-6(b)(2) allows some taxpayers to increase their wealth while penalizing other taxpayers who initially resided out of state and subsequently moved to Alabama.

The Department's interpretation of § 40-18-6(b)(2) discriminates against nonresidents, violating both the Equal Protection and Privileges and Immunities Clauses. Mr. Robertson was unable to deduct depreciation prior to 1991

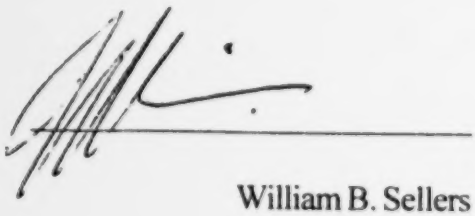
because Texas did not have state income tax. Therefore, Mr. Robertson should not be required to decrease the tax bases of his properties for a depreciation deduction he did not receive. However, the Department wants Mr. Robertson to decrease his bases in spite of the fact that he was unable to take a depreciation deduction prior to 1991. Had Mr. Robertson been an Alabama resident prior to 1991, he could have deducted depreciation on his properties in Oklahoma. Under the Department's interpretation of the statute, Mr. Robertson will pay more taxes overall than a resident similarly situated because he was unable to benefit from the depreciation deductions that usually correspond with the decrease in bases. As a result, the Department's interpretation is discriminatory toward nonresidents and violates both the Equal Protection and Privileges and Immunities Clauses.

CONCLUSION

The Department's interpretation of Alabama Code § 40-18-6(b)(2) violates the Due Process Clause, Equal Protection Clause and the Privileges and Immunities clause of the U.S.

Constitution. The Department has adopted an overly broad interpretation of this statute by requiring Mr. Robertson to pay taxes on depreciation deductions he was unable to receive and for a period when he was not an Alabama resident. This interpretation results in Mr. Robertson's property being taken without due process of law because the Department does not have jurisdiction over Mr. Robertson's person or property for the period prior to 1991. In addition, the Department's interpretation unfairly discriminates against Mr. Robertson because he will pay more taxes than an Alabama resident similarly situated simply because he was a nonresident prior to 1991.

Thus, Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari and address these issues.



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APPENDIX

ARTICLE IV.

The States and Territories.<S>

Section 1.

Full faith and credit; state laws

Statute text

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2 Privileges and immunities - Fugitives

Section 2.

Privileges and immunities - Fugitives

Statute text

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other

crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

[AMENDMENT XIV]

[Due Process - Equal Protection].

Section 1. Rights of citizens; states not to abridge or deny

Section 1.

Rights of citizens; states not to abridge or deny

Statistic text

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Code § 40-18-6.<S> Basis.

(a) *Basis (unadjusted) of property.*- The basis of property shall be the cost of the property with the following exceptions:

(1) *Inventory value.* If the property should have been included in the last inventory, the basis shall be the last inventory value thereof.

(2) Gift or Transfer in trust. If the property was acquired by gift or by a transfer in trust, the basis shall be determined in accordance with 26 U.S.C. § 1015. If property was acquired by gift or transfer in trust on or after December 31, 1932 and prior to March 15, 1985, the basis shall be the fair and reasonable

market value of the property at the time of the acquisition.

(3) *Property transmitted at death.* If the property was acquired from a decedent, the taxpayer's basis in the property shall be determined in accordance with 26 U.S.C. § 1014.

(4) *Property acquired upon like-kind exchange.* If the property was acquired upon an exchange described in subsection (c) of Section 40-18-8<S>, the basis shall be determined in accordance with 26 U.S.C. § 1031(d).

(5) *Transfers to corporation.* The basis of property received by a distributee in a transaction described in subsection (e) or (f) of Section 40-18-8<S> shall be determined in accordance with 26 U.S.C. § 358. The basis of property acquired by a corporation in a transaction described in subsection (e) or (f) of Section 40-18-8<S> shall be determined in accordance with 26 U.S.C. § 362.

(6) *Property acquired on liquidation of subsidiary.* The basis of property acquired by a corporation as a result of a liquidation of a subsidiary to which Section 40-18-8<S>(h)

applies shall be determined in accordance with 26 U.S.C. § 334(b).

(7) *Basis of property of subsidiary after acquisition.* The basis of property owned by a corporation shall be determined under 26 U.S.C. § 338, relating to the treatment of certain stock purchases as asset acquisitions, if an election under the section is in effect for federal income tax purposes.

(8) *Basis of property received in liquidation in which gain or loss is recognized.* The basis of property received in a distribution in complete liquidation in which a gain or loss is recognized on the receipt of the property shall be determined in accordance with 26 U.S.C. § 334(a).

(9) *Basis of stock after stock dividend.* The basis of stock with respect to which a corporation makes a distribution of its stock and the basis of the stock so distributed shall be determined in accordance with 26 U.S.C. § 307.

(10) *Involuntary conversion.* If property was acquired in connection with an involuntary conversion in which a gain or

loss was not recognized under subsection (d) of Section 40-18-8<S>, the basis of the property shall be determined in accordance with 26 U.S.C. § 1033.

(11) *Property acquired before January 1, 1933.* The basis for determining gain or loss on the sale or disposition of property acquired prior to January 1, 1933, shall be the fair and reasonable market value as of January 1, 1933. In determining the fair and reasonable market value of stock in a corporation as of January 1, 1933, due regard shall be given to the fair and reasonable market value of the assets of the corporation as of that date.

(12) *Determination of amount of loss or gain or depreciation or depletion.* Whenever in the calculation of income taxable hereunder for any taxable year it is necessary to determine the amount of gain or loss or of depreciation or depletion in the case of property acquired before January 1, 1933, the basis of property shall be fixed in the same manner as is provided in subdivision (11) of this subsection.

(13) *Property acquired from spouse or former spouse.* If the property was acquired from a spouse or former spouse in a transaction in which a gain or loss was determined under Section 40-18-8<S>(m), then the basis shall be determined in accordance with 26 U.S.C. § 1041.

(14) *Basis of replacement property in sale of stock to employee stock ownership plan or cooperative.* If, in connection with a sale of securities to an employee stock ownership plan or an eligible worker-owned cooperative, any gain was not recognized pursuant to Section 40-18-8<S>(n), the basis of the qualified replacement property, as defined in 26 U.S.C. § 1042, shall be determined in accordance with 26 U.S.C. § 1042(d).

(15) *Basis of property to subchapter K entity.* The basis of property contributed to a subchapter K entity under Section 40-18-8<S>(o) shall be determined in accordance with 26 U.S.C. § 723.

(16) *Basis of interest in subchapter K entity.*

a. Initial basis. The basis of an interest in a subchapter K entity resulting from a contribution of property described in Section 40-18-8<S>(o) shall be determined in accordance with 26 U.S.C. § 722.

b. Adjustments to basis. The basis determined under paragraph a. shall be increased or decreased in accordance with 26 U.S.C. § 705. The amount of the increases and decreases shall be determined without regard to the allocation and apportionment rules of Section 40-18-22<S>.

c. Special basis adjustments. If a subchapter K entity has in effect an election under 26 U.S.C. § 754, the basis of the property of the subchapter K entity shall be determined in accordance with 26 U.S.C. §§ 734 and 743.

(17) *Basis of property distributed to subchapter K entity.* The basis of property distributed by a subchapter K entity shall be determined in accordance with 26 U.S.C. § 732.

(b) *Adjusted basis.*- The adjusted basis for determining the gain or loss from the sale or other disposition of property,

whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided. Proper adjustment in respect of the property shall in all cases be made:

(1) For expenditures, receipts, losses, or other items, properly chargeable to capital account, including taxes and other carrying charges on unimproved and unproductive real property, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining taxable income for the taxable year or prior taxable year.

(2) For exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed, but not less than the amount allowable under this chapter.

Alabama Code § 40-18-7. Gain or loss.

Statute text

(a) *Computation of gain or loss.* - Except as hereinafter provided in this section, the gain from the sale or other

disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in subsection (b) of Section 40-18-6<S>, and the loss shall be the excess of such basis over the amount realized.